

No. 84-68 (15)

DEC 26 1984

IN THE

ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1984

KERR-MCGEE, CORPORATION,
v. *Petitioner*,THE NAVAJO TRIBE OF INDIANS, *et al.*,
*Respondents.*On Writ of Certiorari to the
United States Court of Appeals for the Ninth CircuitBRIEF OF AMICI CURIAE THE SHOSHONE INDIAN
TRIBE AND ARAPAHOE INDIAN TRIBE OF THE WIND
RIVER RESERVATION, WYOMING, THE ASSINIBOINE
AND SIOUX TRIBES OF THE FORT PECK
RESERVATION, MONTANA, AND THE
PUEBLO DE ACOMA, NEW MEXICO
IN SUPPORT OF AFFIRMANCEREID PEYTON CHAMBERS *
LOFTUS E. BECKER, JR.SONOSKY, CHAMBERS, SACHSE
& GUIDO
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 342-9131*Counsel for the Shoshone Tribe
of the Wind River Indian
Reservation, Wyoming and the
Assiniboine and Sioux Tribes
of the Fort Peck Indian
Reservation, Montana*THOMAS W. FREDERICKS
FREDERICKS & PELCYGER
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 443-1683*Counsel for the Arapahoe Indian
Tribe of the Wind River Indian
Reservation, Wyoming*PETER C. CHESTNUT
620 Roma, N.W., Suite D
Albuquerque, New Mexico 87102
(505) 842-6060*Counsel for the Pueblo de Acoma
of New Mexico*

* Counsel of Record

378

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. CONGRESS, THE EXECUTIVE BRANCH, AND THE COURTS HAVE HISTORICALLY CONCLUDED THAT INDIAN TRIBES HAVE THE RIGHT TO TAX ACTIVITIES ON THEIR RESERVATIONS SUBJECT ONLY TO THE SUPERVENING AUTHORITY OF CONGRESS	7
II. THE INDIAN REORGANIZATION ACT WAS INTENDED TO PROVIDE INDIANS WHO DESERED TO DO SO WITH A MEANS OF REVITALIZING TRIBAL GOVERNMENT. IT WAS NOT DESIGNED TO FORCE INDIAN TRIBAL GOVERNMENTS INTO A SINGLE MOLD OR TO LIMIT TRIBAL TAXING POWER	13
III. THE INDIAN MINERAL LEASING ACT OF 1938 WAS INTENDED TO PROVIDE A UNI- FORM SYSTEM OF MINERAL LEASING PROCEDURES FOR MOST (BUT NOT ALL) TRIBAL TRUST LANDS. IT WAS NOT IN- TENDED GENERALLY TO DEPRIVE IN- DIAN TRIBES OF THEIR RECOGNIZED TAXING POWER	19
IV. NON-INDIANS DOING BUSINESS ON IN- DIAN RESERVATIONS DO NOT REQUIRE SPECIAL PROTECTIONS AGAINST TRIBAL TAXATION	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES:	Page
<i>Ex parte Bi-A-Lil-Le</i> , 12 Ariz. 150, 100 P. 450 (1909)	6
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	25, 27
<i>Buster v. Wright</i> , 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906)	12
<i>Commonwealth Edison Co. v. Montana</i> , 453 U.S. 609 (1981)	6, 8, 28
<i>Conoco, Inc. v. Shoshone and Arapahoe Tribes</i> , 569 F.Supp. 801 (D.Wyo. 1983), appeal docketed Nos. 83-2243, 83-2255 (10th Cir. Oct. 5, 1983)	2
<i>Delaware Tribal Business Comm. v. Weeks</i> , 430 U.S. 73 (1977)	7
<i>Iron Crow v. Oglala Sioux Tribe</i> , 231 F.2d 89 (8th Cir. 1956)	12
<i>Maxey v. Wright</i> , 3 Ind. T. 243, 54 S.W. 807 (Ct. App. Ind. Terr.), affirmed, 105 F. 1003 (8th Cir. 1900)	12
<i>McClanahan v. Arizona State Tax Commission</i> , 411 U.S. 164 (1973)	26, 27
<i>Menominee Tribe v. United States</i> , 391 U.S. 404 (1968)	27
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982)	8, 9, 12, 19, 20, 25
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973)	26
<i>Morris v. Hitchcock</i> , 194 U.S. 384 (1904)	12
<i>New Mexico v. Mescalero Apache Tribe</i> , — U.S. —, 103 S. Ct. 2378 (1983)	19
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978)	9
<i>Pueblo of Santa Rosa v. Fall</i> , 273 U.S. 315 (1927)	8
<i>Rice v. Rehner</i> , — U.S. —, 77 L.Ed.2d 961 (1983)	12, 25
<i>In re Sanborn</i> , 148 U.S. 222 (1893)	8
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	15, 19, 25, 29
<i>Shoshone Tribe v. United States</i> , 299 U.S. 476 (1937)	7

TABLE OF AUTHORITIES—Continued

Page	
<i>Squire v. Capoeman</i> , 351 U.S. 1 (1956)	13
<i>Stephens v. Cherokee Nation</i> , 174 U.S. 445 (1899)	7
<i>United States v. Alcea Band of Tillamooks</i> , 329 U.S. 40 (1946)	7
<i>United States v. Mazurie</i> , 419 U.S. 544 (1975)	8
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978)	8
<i>United States ex rel Hualapai Indians v. Santa Fe Pac. Railroad</i> , 314 U.S. 339 (1941)	25
<i>Warren Trading Post v. Arizona Tax Commission</i> , 380 U.S. 685 (1965)	26
<i>Washington v. Confederated Bands of the Yakima Indian Nation</i> , 439 U.S. 463 (1979)	29
<i>Washington v. Confederated Tribes of the Colville Indian Reservation</i> , 447 U.S. 134 (1980)	9, 12, 17, 27
<i>Washington v. Fishing Vessel Association</i> , 443 U.S. 658 (1979)	27
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980)	19, 26, 27
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	27
STATUTES AND REGULATIONS:	
15 U.S.C. §§ 3320(a), (c)(1) (1982)	19
25 U.S.C. § 71 (1982)	20
25 U.S.C. § 177 (1982)	7, 20
25 U.S.C. §§ 261, 262 (1982)	11
25 U.S.C. § 311 (1982)	7
25 U.S.C. §§ 312-318a (1982)	7
25 U.S.C. § 319 (1982)	7
25 U.S.C. § 320 (1982)	7
25 U.S.C. § 321 (1982)	7
25 U.S.C. § 323 (1982)	7
25 U.S.C. § 348 (1982)	8
25 U.S.C. § 396 (1982)	23
25 U.S.C. §§ 396a-396g (1982)	7, 20
25 U.S.C. § 396a (1982)	23
25 U.S.C. § 396b (1982)	19, 23, 24
25 U.S.C. § 396c (1982)	23
25 U.S.C. § 396d (1982)	24

TABLE OF AUTHORITIES—Continued

	Page
25 U.S.C. § 396e (1982)	23
25 U.S.C. § 396f (1978)	23
25 U.S.C. § 398 (1982)	21
25 U.S.C. § 398a (1982)	21
25 U.S.C. § 399 (1982)	7, 21
25 U.S.C. § 400a (1982)	21
25 U.S.C. § 407 (1982)	7
25 U.S.C. § 415 (1982)	7
25 U.S.C. §§ 416-416j (1982)	7
25 U.S.C. § 416h (1982)	8
25 U.S.C. §§ 450-450n (1982)	19
25 U.S.C. § 476 (1982)	<i>passim</i>
25 U.S.C. § 477 (1982)	<i>passim</i>
25 U.S.C. § 478 (1982)	3, 16
25 U.S.C. § 479 (1982)	18, 20
25 U.S.C. § 613 (1982)	2
25 U.S.C. §§ 641-646 (1982)	7
25 U.S.C. §§ 1301-1341 (1982)	19
25 U.S.C. §§ 1451 <i>et seq.</i> (1982)	19
25 U.S.C.A. §§ 2101-2108 (West 1983)	8
26 U.S.C.A. § 7871 (West 1984)	19
30 U.S.C.A. § 1701(a) (West, 1984)	4
30 U.S.C.A. §§ 1732-1736 (West 1984)	19
Act of July 22, 1790, c. 33, § 4, 1 Stat. 137	7
Act of February 28, 1891, 26 Stat. 795	21
Act of June 28, 1898, § 29, 30 Stat. 495, 505, 512	8, 10
Act of June 4, 1920, c. 224, § 6, 41 Stat. 753 as amended by Act of May 26, 1926, c. 403, 44 Stat. 658	23
Act of May 11, 1938, c. 198, § 7, 52 Stat. 347, 348	23
Amended Constitution and Bylaws of the Hualapai Tribe of the Hualapai Reservation, Arizona, Art. VI Sec. 1(m) (1956)	15
Amended Constitution and Bylaws of the Pueblo of Laguna, New Mexico, Art. IV, Sec. 1(e) (4) (1958)	15

TABLE OF AUTHORITIES—Continued

	Page
Amended Constitution and Bylaws of the San Carlos Apache Tribe of Arizona, Art. V, Sec. 1(k) (1954)	15
Constitution and Bylaws of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reserva- tion, Art. VII, Sec. 3 (1960)	2, 17
Constitution and Bylaws of the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the State of Wisconsin, Art. VI, Sec. 1(j) (1936) as amended by Amendment XXVI (1978)	15
Constitution and Bylaws of the Menominee Indian Tribe of Wisconsin, Art. III, Sec. 1 (1977)	15
Montana Code Annotated, § 15-23-601	28
Montana Code Annotated, § 15-36-101	28
Montana Code Annotated, § 15-38-104	28
Montana Code Annotated, § 82-11-131	28
Wyo. Stat. § 30-5-116(b) (ii)	28
Wyo. Stat. § 39-2-402	28
Wyo. Stat. § 39-6-302	28
25 C.F.R. Part 211 (1983)	24
25 C.F.R. § 211.29 (1983)	24
 LEGISLATIVE MATERIALS:	
<i>Hearings Before the Committee on Indian Affairs</i> <i>United States Senate on S. 2755, 73d Cong., 2d</i> <i>Sess. (1934)</i>	<i>16</i>
S. Rep. No. 698, 45th Cong., 3d Sess. (1879)	10
S. Rep. No. 1080, 73d Cong., 2d Sess. (1934)	13, 14
S. Rep. No. 614, 74th Cong., 1st Sess. (1935)	22
S. Rep. No. 985, 75th Cong., 3d Sess. (1937)	22
H. Rep. No. 1872, 75th Cong., 3d Sess. (1938)	22
78 Cong. Rec. 11123 (1934)	16
78 Cong. Rec. 11124 (1934)	16
78 Cong. Rec. 11125 (1934)	16
78 Cong. Rec. 11726 (1934)	14
78 Cong. Rec. 11729 (1934)	14
78 Cong. Rec. 11732 (1934)	16

TABLE OF AUTHORITIES—Continued

	Page
78 Cong. Rec. 12162 (1934)	16
78 Cong. Rec. 12165 (1934)	16
81 Cong. Rec. 6016 (1937)	22
81 Cong. Rec. 7715 (1937)	22
81 Cong. Rec. 8399 (1937)	22
81 Cong. Rec. 8576 (1937)	22
83 Cong. Rec. 2798 (1938)	22
83 Cong. Rec. 6057 (1938)	22
 OTHER MATERIALS:	
F. Cohen, <i>Handbook of Federal Indian Law</i> (1942 ed.)	11, 13, 16, 20
F. Cohen, <i>Handbook of Federal Indian Law</i> (1982 ed.)	13
17 Op. Att'y Gen. 134 (1881)	10
18 Op. Att'y Gen. 34 (1884)	10
23 Op. Att'y Gen. 214 (1900)	11
Memo. Sol. Int., April 15, 1936, reprinted in 1 <i>Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974</i> (G.P.O., n.d.)	18
Memo. Sol. Int., Feb. 17, 1939 in 1 <i>Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974</i> (G.P.O., n.d.)	11
<i>Powers of Indian Tribes</i> , 55 Interior Dec. 14 (1934)	11, 17
Report of the Commission, <i>Fiscal Accountability of the Nation's Energy Resources</i> (1982)	1
Rev. Proc. 83-87, 1983-50 I.R.B. 9	3
[1940] <i>Report of the Secretary of the Interior... Tribal Self-Government and the Indian Reorganization Act</i> , 70 Mich. L. Rev. 955 (1972)	26
	13

BRIEF OF AMICI CURIAE THE SHOSHONE INDIAN TRIBE AND ARAPAHOE INDIAN TRIBE OF THE WIND RIVER RESERVATION, WYOMING, THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, MONTANA, AND THE PUEBLO DE ACOMA, NEW MEXICO

INTEREST OF AMICI

The Shoshone Tribe and the Arapahoe Tribe, both of the Wind River Indian Reservation in Wyoming, are important Indian Tribes with governing bodies recognized by the Secretary of the Interior. Over 1,700,000 acres of land on the Reservation are held in trust for the Tribes or for their enrolled members, over 5,000 of whom live on the Reservation. The Tribes have never organized under § 16 of the Indian Reorganization Act, 25 U.S.C. § 476 (1982), nor have they incorporated under § 17 of that Act, 25 U.S.C. § 477 (1982). Neither tribe has a written Constitution. Both are governed by elected Business Councils of six members.

Many of the lands on the Wind River Reservation are leased for oil and gas development either by the Tribes or by individual tribal members. In 1978, in order to fund a tribal Minerals Department to oversee oil and gas leasing on the Reservation and for other purposes, the Shoshone and Araphaoe Tribes enacted an oil and gas severance tax.¹ The taxing ordinance was submitted to the Secretary of the Interior, who returned it to the

¹ In the fall of 1980, the Tribes discovered that lessees on the Reservation had for years been underreporting oil and gas production on the Reservation and, in some instances, had been taking oil and gas without reporting its production at all. These discoveries, in turn, led to intensive congressional and administrative investigation of oil and gas development on Indian lands throughout the country. Those investigations disclosed that because of "serious inadequacies in management," the federal government has been "failing to detect underpayment of oil and gas royalties." Report of the Commission, *Fiscal Accountability of the Nation's Energy Resources* 13 (1982).

Tribes with a letter stating his conclusion that the ordinance did not require secretarial approval.

Although the tribal severance tax was expected to be a major source of revenue for tribal departments and services,² since 1980 the tax has been tied up in litigation challenging the Tribes' authority to enact it. *Conoco, Inc. v. Shoshone and Arapahoe Tribes*, 569 F. Supp. 801 (D. Wyo. 1983), appeal docketed, Nos. 83-2243, 83-2255 (10th Cir. Oct. 5, 1983). That litigation presents issues substantially similar to those involved in this case.

The Assiniboine and Sioux Tribes of the Fort Peck Reservation in northeastern Montana are important Indian tribes with an elected governing body recognized by the Secretary of the Interior. About 917,000 acres of land on the Reservation are held in trust for the Tribes or tribal members. The Tribes have operated under a Constitution since 1927. They voted not to organize under 16 of the Indian Reorganization Act, 25 U.S.C. § 476 (1982), and they have not incorporated under § 17 of that Act, 25 U.S.C. § 477 (1982). The Tribes' current written constitution, adopted in 1960, requires the Secretary of the Interior to approve of certain types of ordinances, including taxes affecting nonmembers of the Tribes. Constitution and Bylaws of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Art. VII, Sec. 3 (1960).

Many of the lands on the Reservation are leased for oil and gas development. The Tribes enacted a minerals severance tax in 1980. The tax was subsequently approved by the Department of the Interior as required by the Tribal Constitution. An amendment, adopted in 1983, increasing the tax rate from 1% to 2%, was also approved by the Department. The Tribes are now collecting the tax from oil and gas lessees.

² Although the Tribes receive substantial revenues from mineral leases, by statute 85% of those revenues must be distributed *per capita* to tribal members. 25 U.S.C. § 613 (1982). Accordingly, they must resort to taxes to fund a large part of their operations.

The Pueblo de Acoma ("Acoma") is an important Indian Pueblo in New Mexico. The Acoma Tribal Council is the federally recognized governing body of the Pueblo. *E.g.*, Rev. Proc. 83-87, 1983-50 I.R.B. 9.

Acoma's traditional government system has continued fundamentally unchanged for centuries. While Acoma people voted to accept the Indian Reorganization Act pursuant to 25 U.S.C. § 478 (1982), the Pueblo has *not* adopted a written constitution or by-laws, preferring instead to continue "to organize for its common welfare" in the ancient forms which retain vitality to the present.

Approximately 3,000 Acoma Pueblo members live within the exterior boundaries of the Pueblo lands, which currently consist of approximately 250,000 acres. The lands are subject to numerous encumbrances, consisting of leases, rights-of-way, etc. Acoma has no oil and gas development leases.

The Acoma Tribal Council recently enacted a tax on non-retail commercial leaseholds. While the ordinance has been submitted for review and approval by the Secretary of the Interior or his delegate, Acoma has not conditioned the adoption of the ordinance or the collection of the tax on federal approval of any kind.

In addition to their concern that the decision in this case not call into question their tribal taxes, *amici* Tribes share with all Indian tribes a desire not to have this Court impose, as a matter of federal law, requirement that the Secretary of the Interior approve tribal ordinances of any kind, except where a tribal constitution or the procedures of the tribal governing body so require.

This brief is filed with the written consent of all parties to the litigation. The consents have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

Petitioner Kerr-McGee Corporation argues that Indian tribes not organized under the Indian Reorganization Act of 1934 ["the IRA"] cannot impose taxes on nonmem-

bers doing business on their reservations without the approval of the Secretary of the Interior; and that, in any event, tribes not both organized and incorporated under the IRA cannot impose taxes on oil and gas companies leasing tribal lands under the Mineral Leasing Act of 1938. Both arguments rest upon very substantial misunderstandings of the body of federal Indian law and the specific statutes relied on.

1. There is no reason in law or policy for this Court to impose on the Secretary of the Interior a duty that Congress has not imposed and that the Secretary does not want. Congress can limit the powers of tribal governments by, for example, requiring the tribal ordinances be approved by the Secretary of the Interior to be valid. On occasion, Congress has done so. Congress has neither directed nor authorized the Secretary of the Interior to review the tribal taxes at issue here. This Court should not insist that the Secretary do something Congress has not authorized him to do.³

Long before enactment of the IRA all three branches of the federal government had concluded that Indian tribes possessed the inherent authority to lay taxes on nonmembers residing or doing business on their reservations. Neither the executive, the legislative, nor the judicial branches had ever found that approval of such tribal taxes by a federal official was required in the absence of explicit treaty or statutory provisions commanding such review. The Indian Reorganization Act of 1934 in no way changed this aspect of existing law.

³ This is a particularly bad time to impose additional duties on the Secretary. Only two years ago, after extensive hearings, Congress found that the Secretary was already inadequately supervising royalty collections on Indian trust land, and that "it is essential" that his supervision of royalty payments be improved. Oil and Gas Royalty Management Act of 1982, § 2(a), 30 U.S.C.A. § 1701(a) (West, 1984). Imposing additional duties that Congress has *not* ordered will make it harder for the Secretary—in these days of increasingly stringent budgets—to carry out those duties that Congress *has* ordered and, indeed, found "essential".

2. The IRA was designed to *free* tribes from bureaucratic federal control, not to subject them to new requirements of executive approval. The IRA does not require any tribes to secure the Interior Department's approval of tribal ordinances. For tribes that reorganized under the Act, the only act of secretarial approval required by Congress was approval of the tribal constitution and bylaws. Tribal ordinances, by contrast, would require approval by the Secretary only if the tribal constitution or bylaws say so. Some IRA tribes have adopted constitutions requiring secretarial approval of taxing ordinances. Other IRA tribes have adopted constitutions authorizing taxation without secretarial approval, or (like *amicus* Pueblo de Acoma) have not adopted written constitutions at all.

The same is true for tribes that chose not to organize under the IRA. Some of the tribes that rejected the IRA (like *amicus* Assiniboine and Sioux Tribes) have constitutions requiring secretarial approval of their ordinances, others do not. And since the IRA, both Congress and the Secretary of the Interior have fostered the development of self-government in all Indian tribes, irrespective of whether they reorganized under the IRA, or whether their ordinances require Interior Department approval.

3. The Indian Mineral Leasing Act of 1938 likewise does not limit tribal taxing powers. That Act was designed to bring order to the "patchwork" of federal statutes that then authorized some (but not all) kinds of mineral leasing of tribal trust lands on some (but not all) Indian reservations. The Act sought to increase tribal powers and revenues. It in no way decreased them, either expressly or by preemptively "occupying the field" to the exclusion of tribal taxing power.

4. Non-Indians doing business on Indian reservations do not need more "protection" from tribal taxation than Congress has seen fit to require. It is not insignificant that in the present case Kerr-McGee has shown no flaw

in the Navajo taxes except for the company's inherent corporate allergy to all forms of taxation. Of course, Kerr-McGee, a Delaware corporation, is not entitled to vote in Navajo elections. Neither is it entitled to vote in New Mexico elections—or for that matter in Delaware. (Its stockholders and employees, Indian or non-Indian, may vote in any elections for which they are qualified). But just as Congress has ample power to act if it believes that harsh state taxation of mineral resources is unfair to citizens or otherwise contrary to the national interest, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 628 (1981) (30% state severance tax on coal), so Congress can act to supervise Indian tribal taxation of nonmembers.

Finally, this Court should not consider legislating a requirement of secretarial approval for tribal taxation of nonmembers. "Indians are not wards of Executive officers, but wards of the United States . . ." *Ex parte Bi-A-Lil-Le*, 12 Ariz. 150, 151, 100 P. 450, 451 (1909). Oil and gas producers are certainly not powerless to obtain the ear of Congress. Congress can investigate, as it has in the past. This Court cannot. Congress can legislate, as it has in the past—with specific statutes tailored to deal with specific problems. This Court cannot. Absent direction from Congress, in the teeth of the longstanding (and present) position of the Secretary of the Interior, this Court should not deprive Indian tribal governments of literally millions of dollars of tax revenues upon which they have relied and which they desperately need.

ARGUMENT

I. CONGRESS, THE EXECUTIVE BRANCH, AND THE COURTS HAVE HISTORICALLY CONCLUDED THAT INDIAN TRIBES HAVE THE RIGHT TO TAX ACTIVITIES ON THEIR RESERVATIONS SUBJECT ONLY TO THE SUPERVENING AUTHORITY OF CONGRESS.

It is, of course, unquestioned that Congress has plenary power over Indian affairs. *E.g.*, *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 57 (1946); *Shoshone Tribe v. United States*, 299 U.S. 476, 496-498 (1937); *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899). Since the earliest days of the Republic, for example, Congress has exercised this power by enacting statute after statute to prohibit any conveyance of Indian lands—such as by leasing—except with the approval of the Secretary of the Interior.⁴ The gov-

⁴ The early Indian Trade and Intercourse Acts (*e.g.*, Act of July 22, 1790, c. 33, § 4, 1 Stat. 137, the present successor to which is codified as 25 U.S.C. 177 (1982)) provided that:

No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

More recent statutes uniformly require the Secretary of the Interior's approval of transactions by Indian tribes relating to their lands, including rights-of-way, leases, timber sales, and mortgages to be granted by Indian tribes. *See, e.g.*, 25 U.S.C. § 311 (1982) (public highways), §§ 312-318a (railroad, telegraph, telephone line rights-of-way, and townsite stations), § 319 (telephone and telegraph rights-of-way), § 320 (railway reservoirs or materials), § 321 (pipeline rights-of-way), § 323 (rights-of-way for any purpose), §§ 396a-396g (leases for oil and gas mining and permits to prospect), § 399 (leases for mining purposes), § 407 (sale of dead and fallen timber), § 415 (leases of tribal land for public, religious, educational, recreational, residential, or business purposes), §§ 416-416j (leases on San Xavier and Salt River Reservations), §§ 641-

ernmental powers of Indian tribes are also subject to limitation by exercise of Congress's plenary power. Congress can prescribe the forms, or limit or expand the powers of tribal governments—as in the Indian Reorganization Act of 1934, discussed in Part II, *infra*. Congress can and sometimes has also required federal approval of tribal ordinances.⁸

In the absence of action by Congress limiting their governmental powers, however, Indian tribes are sovereign governments which exercise the "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978). "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Id.* at 323. Tribal powers extend "both over their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). Tribal governments police their reservations, operate judicial systems, regulate and distribute the use of tribal property, impose zoning, land use, and environmental controls, and generally act to provide the "advantages of a civilized society," *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-138 (1982); *Commonwealth Edison Co. v. Montana*,

646 (authorizing Hopi tribal council to mortgage Hopi land for industrial park); §§ 2201-2108 (minerals agreements).

The purpose of the Secretary's approval power over property transactions, this Court has held, is generally to protect Indian tribes from improvident bargains with greedy or overreaching non-Indians. *See, e.g., Pueblo of Santa Rosa v. Fall*, 273 U.S. 315 (1927); *In re Sanborn*, 148 U.S. 222, 227 (1893).

⁸ *E.g.*, Act of November 2, 1966, 80 Stat. 1113, 25 U.S.C. § 416h (requiring approval of the Secretary of the Interior for zoning, building and sanitary regulations by the Papago and Salt-River Pima Maricopa Tribes); Act of June 28, 1898, § 29, 30 Stat. 495, 505, 512 (requiring federal approval for certain ordinances of Choctaw and Chickasaw tribal governments). *See General Allotment Act of 1887*, § 5, 25 U.S.C. § 348 (1982) (restricting tribal power to determine rules of inheritance for allotted lands).

453 U.S. 609, 627 (1981), to all those—Indian and non-Indian alike—who are on their reservations.

To finance these activities, like every other civilized government known to man, Indian tribes lay and collect taxes on persons and property within their jurisdiction. As this Court stated in *Merrion, supra* at 137, this "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government," a power that "enables a tribal government to raise revenues for its essential services" and "to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within [its] . . . jurisdiction." It "simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers." *Id.* at 138, n.5, quoting 617 F.2d at 550.

It is of course true that the powers of Indian tribes may be limited, in addition to limitations expressly imposed by Congress, by constraints that are implicit in tribes' status as domestic dependent sovereigns. *E.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). But this Court has specifically held twice in this decade that tribes' power to tax nonmembers who do business on trust lands within an Indian Reservation is not so limited by virtue of tribes' dependent status or because the exercise of such a power would be contrary to the national interest. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, see especially at 144-147 and 145 n.11 (1982); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980). This is supported by a long line of decisions in each of the three branches of the Federal Government—Congress, the Executive Branch and the Judiciary—consistently recognizing the power of Indian tribes to tax persons and property within their reservations, subject only to such federal supervision as Congress has seen fit to specifically impose. This common understanding of the

three branches has applied to tribal taxes irrespective of federal approval of the ordinances involved.

In 1879, the Senate Judiciary Committee investigated an 1876 tax imposed by the Chickasaw Nation (*without* any federal approval), concluded that the tax was valid, and reported its conclusion to the Senate. S. Rep. No. 698, 45th Cong., 3d Sess. (1879).⁶ In 1898, apparently responding to particular concerns regarding the Choctaw and Chickasaw Tribes, Congress passed a statute providing specifically that certain acts of their legislatures (including taxes on nonmembers) would be valid only if specifically approved by the President. Act of June 28, 1898, § 29, 30 Stat. 495, 505, 512. Congress would not have passed such a statute had it thought that tribal taxes required federal approval in the *absence* of the explicit statutory restriction. And had Congress desired to limit the authority of *all* tribal legislatures to tax non-members on their reservations, it could easily have done so. It did not, and it never has.⁷

This is also the present—and the past—understanding of the Executive Branch. A Choctaw and Chickasaw tax on nonmembers on the reservation was ruled valid by the Attorney General in 1881, although (as noted above) it was a tribal act without approval by federal officials. 17 Op. Att'y Gen. 134 (1881). This opinion was reaffirmed three years later by a different Attorney General. 18 Op. Att'y Gen. 34 (1884). In 1900, yet a third Attorney General upheld the power of Indian tribes to tax non-Indians residing or doing business on their reserva-

⁶ In noting that the Chickasaw power to tax was “subject to the supervisory control of the Federal Government,” *id.*, at 2, the Senate Report was referring to the undoubtedly power of Congress to revise or otherwise control the tax. It had, after all, found the tax valid without any federal approval. Kerr-McGee, which apparently thinks that this Report supports its position, *see* Petitioner’s Brief at 23, simply misunderstands it.

⁷ Congress has, however, on occasion enacted laws requiring specific tribes to obtain federal approval of some or another of their ordinances. *See* Footnote 5, *supra*.

tions, even though some of the persons taxed were doing nothing more than residing on lands purchased under Acts of Congress. 23 Op. Att'y Gen. 214 (1900) (Five Civilized Tribes).⁸ These were not offhand opinions. The Choctaw and Chickasaw taxes were considered twice. And writing in 1900, Attorney General Griggs noted that “the question is . . . one of great magnitude and importance.” 23 Op. Att'y Gen. 214, 215.

This also has been the longstanding and consistent position of the Department of the Interior:

Chief among the powers of sovereignty recognized as pertaining to an Indian Tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and nonmembers, so far as the nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

Powers of Indian Tribes, 55 Interior Dec. 14, 46 (1945);⁹ *see also* Memo. Sol. Int., Feb. 17, 1939, in 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974*, at 873 (G.P.O., n.d.); F. Cohen, *Handbook of Federal Indian Law*, 266-267 (1942 ed.) (hereinafter “1942 Cohen”); *id.* at x (Solicitor Margold’s Introduction). The Department has never departed from that position. In the present case, for example, the Department refused to pass on the Navajo taxing ordinances on the ground that no such departmental approval was required. App. 66-71.

Nor is there any trace of a contrary judicial tradition. As this Court well knows, federal courts have consistently and authoritatively followed the lead of Congress and

⁸ Attorney General Griggs noted in 1900 that the taxes discussed in his opinion had been “approved by the President,” 23 Op. Att'y Gen. at 217, but he did not appear to regard the point as critical. Indeed, his opinion relies heavily on the previous opinions cited, even noting that their “rule applies to other [tribes]”. *Id.*, at 216.

⁹ The sole exception noted was federally-licensed traders operating under 25 U.S.C. §§ 261 and 262 (1982).

the executive branch and upheld tribal power to tax non-members residing or doing business on reservations for more than three quarters of a century. See *Rice v. Rehner*, ____ U.S. ___, ___, 77 L.Ed.2d 961, 971-72 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 136-152 (1982); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980) (one IRA tribe, two non-IRA tribes see 447 U.S. *supra* at 143, n.11); *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906); *Maxey v. Wright*, 3 Ind. T. 243, 54 S.W. 807 (Ct. App. Ind. Terr.), *affirmed*, 105 F. 1003 (8th Cir. 1900).

Thus, both before and after enactment of the Indian Reorganization Act of 1934, each branch of the federal government has expressed its considered opinion that Indian tribes have the power to tax nonmembers doing business on Indian reservations. Some of the tribal taxes involved had been approved by federal officials pursuant either to statutes or to tribal constitutions explicitly requiring such approval. Others had *not*, but they were held valid as well.

It follows that unless Congress has specifically divested tribes of taxing authority they still have it.¹⁰ In

¹⁰ Petitioner and *amici* cite a multitude of statutes where Congress has indeed specifically required federal approval of tribal actions. *E.g.*, Petitioner's Brief at 20-23; Brief of Salt River Project at 7. The vast majority of these enactments require federal approval of Indian property transactions, not governmental acts. Compare statutes in footnote 4, *supra*, with those in footnote 5, *supra*. In any event, far from establishing any brooding omnipresence of federal supervision, these statutes show beyond doubt that Congress has consistently legislated on the assumption that *specific* legislation is necessary to restrict either the proprietary or inherent sovereign powers of tribal governments. If the law were as petitioner would have it, Congress has been wasting its time passing unnecessary laws, and federal approval is intrinsically necessary for all tribal actions. But of course Congress has not been wasting its time. It has been legislating, as is its responsibility over Indian affairs, with care and precision.

the next two parts of this Brief, we refute petitioner's arguments that Congress in the Indian Reorganization Act of 1934 or Indian Mineral Leasing Act of 1938 retracted this taxing power from any tribes.

II. THE INDIAN REORGANIZATION ACT WAS INTENDED TO PROVIDE INDIANS WHO DESIRED TO DO SO WITH A MEANS OF REVITALIZING TRIBAL GOVERNMENT. IT WAS NOT DESIGNED TO FORCE INDIAN TRIBAL GOVERNMENTS INTO A SINGLE MOLD OR TO LIMIT TRIBAL TAXING POWER.

The Indian Reorganization Act of 1934, the centerpiece of the New Deal program for Indians, is one of the most important pieces of Indian legislation in American history.¹¹ It was reformist in nature, for it rejected the six decades of Indian policy that immediately preceded it.¹² For more than 60 years since 1871, federal Indian policy had been directed towards assimilating Indians into the mainstream of American life. To this end reservations were broken up and their lands allotted to individual Indians. The thrust of federal policy during this period was not to preserve or promote Indian tribal governments; it was to move individual Indians out of their tribes and into ordinary federal and state citizenship. See generally *F. Cohen, Handbook of Federal Indian Law*, 127-143 (1982 ed.). As a result of these policies, by

¹¹ In the view of Felix Cohen, the paramount scholar in Indian law (*see Squire v. Capoeman*, 351 U.S. 1, 8-9 and n.15 (1956)), this Act is "equalled in scope and significance only by the legislation of June 30, 1834, and the General Allotment Act of February 8, 1887." 1942 Cohen at 84. (Footnotes omitted).

The legislative history and objectives of the IRA are generally summarized in *Tribal Self-Government and the Indian Reorganization Act*, 70 Mich L. Rev. 955, 961-969 (1972).

¹² For example, the IRA was hailed by President Roosevelt as "embod[ying] the basic and broad principles of the administration for a new standard of dealing between the Federal Government and its Indian wards." Letter to Senator Burton K. Wheeler, April 28, 1934, S. Rep. No. 1080, 73d Cong., 2d Sess. 3 (1934).

the 1930s the institutions of many tribes had "very largely disintegrated or been openly suppressed" by excessive Interior Department control. 78 Cong. Rec. 11729 (1934) (remarks of Congressman Howard). And Indian landholdings had been drastically reduced. *E.g.*, *id.* at 11726 (Remarks of Congressman Howard).

The 1934 Act was designed to remedy these problems. As President Roosevelt himself put it, "the continuance of autocratic rule, by a Federal Department, over the lives of more than 200,000 citizens of this Nation is incompatible with American ideals of liberty." Sen. Rep. No. 1080, 73d Cong., 2d Sess. 4 (1934). The remedy for this problem was to encourage tribal governments to organize and exercise powers of self-government and to curb federal bureaucratic control of reservations. A second evil, "the continued application of the allotment laws under which Indian wards have lost more than two-thirds of their reservation lands . . .," *id.*, was rectified by terminating the allotment process and taking various steps to arrest its effects.¹³

Petitioner argues that the 1934 Act—which was designed to reduce, not increase, federal bureaucratic control over tribes—somehow imposed a new executive supervision over tribal taxing authority which did not exist before 1934. After the IRA, they argue, only tribes that reorganized under the IRA and had their tax ordinances approved by the Secretary could tax. Such a result is absolutely inconsistent with the dominant purpose, the provisions and history of the Act.

As to tribes organized under the IRA, the only requirements of secretarial approval in the governmental provisions of the Act are that the Secretary approve the con-

¹³ These two dominant goals recur through the Act's legislative history. For example, Representative Howard stated on the House floor:

Land reform and a measure of home rule for the Indians are the essential and basic features of this bill. 78 Cong. Rec. 11729 (1934).

stitution and bylaws adopted by any tribe under it, Section 16, 25 U.S.C. § 476 (1982), and that he promulgate tribal charters requested under Section 17, 25 U.S.C. § 477 (1982). *The Act nowhere requires tribal ordinances to be approved by the Secretary.*

Moreover, the Secretary has approved constitutions under the Indian Reorganization Act with a broad variety of provisions regarding federal approval of tribal ordinances. As this Court observed in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66, n.22 (1978):

By the terms of its Constitution, adopted in 1935 and approved by the Secretary of the Interior in accordance with the Indian Reorganization Act of 1934, 25 U.S.C. § 476, judicial authority in the Santa Clara Pueblo is vested in its tribal council.

Many tribal constitutions adopted pursuant to 25 U.S.C. § 476, *though not that of the Santa Clara Pueblo*, include provisions requiring that tribal ordinances not be given effect until the Department of Interior gives its approval. (Emphasis added.)¹⁴

Kerr-McGee thus fundamentally misunderstands the Indian Reorganization Act when it argues that the Act commanded secretarial review of any class of Indian tribal ordinances.

As for tribes that elected not to reorganize their governmental structures under the IRA, there is likewise no

¹⁴ Many constitutions of IRA tribes allow tribal legislative bodies to enact taxes *without approval of the Secretary*. *E.g.*, Constitution and Bylaws of the Menominee Indian Tribe of Wisconsin, Art. III, Sec. 1 (1977); Amended Constitution and Bylaws of the Pueblo of Laguna, New Mexico, Art. IV, Sec. 1(e)(4) (1958); Amended Constitution and Bylaws of the Hualapai Tribe of the Hualapai Reservation, Arizona, Art. VI, Sec. 1(m) (1956); Amended Constitution and Bylaws of the San Carlos Apache Tribe of Arizona, Art. V, Sec. 1(k) (1954); Constitution and Bylaws of the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the State of Wisconsin, Art. VI, Sec. 1(j) (1936) as amended by Amendment XXVI (1978). All these constitutions were approved by the Secretary of the Interior in the year indicated in parenthesis.

basis in the language or legislative history of the Act as ultimately passed by Congress¹⁵ to suggest that it limited their powers to tax or imposed a new requirement of Secretarial approval of tax ordinances. Congress knew in 1934 that many tribal governments were still active, functioning entities.¹⁶ Such tribal governments were to be left "entirely undisturbed" by the Act unless a majority of the tribe involved desired otherwise. Letter from Commissioner Collier to Senator Royal S. Copeland, printed at 78 Cong. Rec. 11125 (1934); 25 U.S.C. § 478 (1982).¹⁷ Thus, Section 16 of the Act, 25 U.S.C. § 476

¹⁵ The bill as enacted was radically different from the Interior Department's original proposal (reprinted in *Hearing Before the Committee on Indian Affairs United States Senate on S. 2755*, 73d Cong., 2d Sess. 1-15 (1934)). The original proposal said nothing about preserving existing tribal governments and institutions. It gave Indians the choice whether or not to ask for a charter, but committed the form of the charter granted entirely to the Secretary's discretion. Section 2. And it maintained, quite explicitly, extensive Secretarial power over tribes organizing under the Act. See Sections 3-10. These provisions proposed by Interior were rejected by Congress. Under the IRA as enacted, tribal members were to elect whether to reorganize under the IRA. 25 U.S.C. § 478 (1982).

¹⁶ As Felix S. Cohen points out, Interior Department records show more than fifty tribal constitutions "or documents in the nature of constitutions" that had been adopted prior to the Indian Reorganization Act. 1942 Cohen at 129 n.59.

¹⁷ The sponsors of the bill were quite vehement in their insistence that the IRA was not to be forced upon any unwilling tribe or band of Indians. As noted, see footnote 15, *supra*, the Interior Department's original draft proposal for the IRA was mandatory on all tribes. This produced strong objections from tribes with functioning tribal governments. See, e.g., Senate Hearings, *supra*, at 53-54 (objections of Standing Rock Sioux, Blackfeet, Klamath, and Assiniboine Tribes); 78 Cong. Rec. 11124 (1934) (objections of Yakima Tribe). On the floor of both the House and Senate, the optional nature of the bill as finally enacted was emphasized again and again. See, e.g., 78 Cong. Rec. 11123 (Committee "eliminated all compulsory provisions"), 11732; 12162 ("vast difference" between ultimate and original bill is that "everything in this bill is optional with the Indians"); 12165 ("there is nothing mandatory

(1982), expressly confirms existing tribal powers. See *Powers of Indian Tribes*, 55 Interior Dec. 14, 65-66 (1934) (among chief powers of law predating IRA is power to levy taxes on tribal members and "nonmembers residing or doing any business of any sort within the reservation"); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980) (taxing power "very probably" confirmed by the Indian Reorganization Act).

In fact, many tribes that chose not to reorganize under the Indian Reorganization Act have adopted constitutions that do require approval of certain tribal ordinances by the Secretary of the Interior. *Amici Assiniboine and Sioux Tribes of the Fort Peck Reservation* are one example. Article VII, section 3 of this tribal constitution empowers the Tribal Executive Board to:

To make and enforce ordinances covering the tribes' right to levy taxes and license fees on persons or organizations doing business on the reservation, except that ordinances or regulations affecting non-members trading or residing within the jurisdiction of the tribes shall be subject to the approval of the Secretary of the Interior.

Amici Tribes' oil and gas severance tax has accordingly been approved by the Secretary of the Interior.¹⁸

Petitioner and supporting *amici* appear to believe that federal Indian law divides tribes into two groups—those organized under the IRA and required to obtain Secre-

in this bill as reported"). Far from being a mold into which Congress wished to force Indian tribal governments, the IRA as enacted by Congress was intended simply as an opportunity that could be taken advantage of by those groups of Indians that either had no tribal governments or who were dissatisfied by their present form.

¹⁸ Similarly, the Colville and Lummi Tribes voted not to come within the Indian Reorganization Act, but Secretarial approval is required for their tribal taxing ordinances. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 143-144 and n.11 (1980).

tarial approval for their ordinances, and those not so organized and not required to obtain Secretarial approval for their ordinances. But as we have shown, there is no litmus test dividing tribes that have adopted constitutions under the Reorganization Act and those that have not. Some tribes in each category have required secretarial approval of tribal ordinances, and some in each category have not.

The nub of the matter is that by 1934, Indian tribes throughout the United States were in many different states of self-government. Many tribes—and particularly those that had already adopted constitutions—were functioning governments whose citizens were satisfied with them. Other tribes had lost their traditional forms of government and had nothing but the Bureau of Indian Affairs in their place. And still other Indians had lost their tribal identity entirely even though the Indians still lived on an Indian reservation. The Indian Reorganization Act dealt with tribes in all of these circumstances. Those satisfied with their present governments could continue unaffected by the 1934 Act. Those tribes dissatisfied with the form or powers of their government could reorganize under Section 16. And even those Indians no longer tied together as a tribe could, so long as they lived together on one reservation, obtain a tribal constitution under the Act.¹⁹ Congress in 1934 intended to provide Indians with a broader range of options than they had previously had. It did not intend to force any tribe or group of Indians into a particular mold.

Repeatedly since enactment of the IRA, Congress has acted to further its "overriding goal of encouraging

¹⁹ Although Section 16 of the IRA, 25 U.S.C. § 476 (1982), limits constitutions to "tribes," Section 19 of the Act, 25 U.S.C. § 479 (1982), defines "tribe" as meaning "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." (emphasis added). Under the IRA, constitutions have been issued to groups of Indians not previously recognized as tribes. Memo. Sol. Int., April 15, 1936, reprinted in 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974*, 813-814 (G.P.O., n.d.).

"tribal self-government and economic development" for all tribes. *New Mexico v. Mescalero Apache Tribe*, — U.S. —, —, 103 S. Ct. 2378, 2387 (1983), quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Congress has not distinguished in this legislation between tribes with IRA constitutions and tribes with constitutions not adopted under the IRA (or, indeed, without any tribal constitution at all).²⁰ See, e.g., the Royalty Management Act of 1982, 30 U.S.C.A. §§ 1732-1736 (West 1984) (authorizing delegation of Secretary's oil and gas inspection and enforcement responsibilities to Indian tribes; no distinction between IRA and other tribes); Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.* (1982); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n (1982); Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3320 (a), (c)(1) (1982) (allowing tribal taxes to be recovered under federal price regulations); Tribal Tax Status Act, 26 U.S.C.A. § 7871 (West 1984) (allowing deduction of tribal taxes for federal income tax purposes); Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341 (1982) (see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-66 (1978)). This Court should not legislate a distinction never imagined by Congress and never countenanced by the Department of the Interior.

III. THE INDIAN MINERAL LEASING ACT OF 1938 WAS INTENDED TO PROVIDE A UNIFORM SYSTEM OF MINERAL LEASING PROCEDURES FOR MOST (BUT NOT ALL) TRIBAL TRUST LANDS. IT WAS NOT INTENDED GENERALLY TO DEPRIVE INDIAN TRIBES OF THEIR RECOGNIZED TAXING POWER.

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the then petitioners argued that the Jicarilla Tribe's oil and gas severance tax was forbidden by the

²⁰ The single exception to this statement, 25 U.S.C. § 396b (1982), was enacted to preserve the specific power to lease tribal land, granted to tribes both organized and incorporated under the IRA. See footnote 25 below and the text accompanying it.

Indian Mineral Leasing Act of 1938, c. 198, 52 Stat. 347, as codified, 25 U.S.C. §§ 396a-396g (1982). This Court rejected the argument on the ground that, in any event, § 2 of the Act authorized "tribes organized and incorporated under § 16 and 17" of the Indian Reorganization Act "to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter" adopted pursuant to the Indian Reorganization Act. 455 U.S. at 150.

In the present case, petitioner argues the negative pregnant of the Court's holding in *Jicarilla*: that Congress, in enacting the 1938 Mineral Leasing Act, intended to deprive tribes *not* both organized and incorporated²¹ under the IRA of their existing powers to tax nonmembers holding oil and gas lease. This argument substantially misunderstands both the Indian Mineral Leasing Act and its relationship to the Indian Reorganization Act that Congress had enacted four years before.

Prior to the 1938 Act, a handful of statutes governed the leasing of Indian tribal lands for mineral development. Section 12 of the Act of June 30, 1834, c. 161, 4 Stat. 730 (still in force as 25 U.S.C. § 177 (1982)) generally forbade the leasing of tribal lands except by treaty. The Act of March 3, 1871, 16 Stat. 566, codified as 25 U.S.C. § 71 (1982), forbade further treaties with Indian tribes and, for a while, thus blocked *all* potential mineral leasing. From 1875 to 1924, Congress passed a variety of special acts authorizing the leasing of lands on no less

²¹ Petitioner takes no note of the fact that under the IRA, organization and incorporation are separate matters. Section 16, 25 U.S.C. § 476 (1982), authorizes a "tribe or tribes [as defined in 25 U.S.C. § 479 (1982) to include tribes, bands, pueblos, or merely the Indians residing on one reservation], residing on the same reservation . . . to organize for its common welfare and . . . adopt an appropriate constitution and bylaws." Section 17, 25 U.S.C. § 477 (1982) authorizes Indian tribes to incorporate and authorizes incorporated tribes to exercise various powers, including the power to lease lands, but not "for a period exceeding ten years." Organization and incorporation under the IRA are separate acts, one governmental and the other proprietary in nature.

than eleven separate reservations. See 1942 Cohen at 327.

Beginning in 1891 Congress also began to legislate generally concerning leasing. Section 3 of the Act of February 28, 1891, 26 Stat. 795, authorized tribal councils to lease "bought and paid for" lands for mining purposes for up to 10 years with the consent of the Secretary. In 1924 the leasing period for oil and gas for most lands subject to that Act was extended to ten years "and as much longer as oil or gas shall be found in paying quantities." Act of May 29, 1924, 43 Stat. 244, codified as 25 U.S.C. § 398 (1982). These provisions were extended to cover Executive Order reservations in 1927. Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. § 398a (1982). The Act of June 30, 1919, § 26, 41 Stat. 31, 25 U.S.C. 399 (1982) authorized the Secretary to lease tribal lands in nine named western states for metal mining, for periods of 20 years with a preferential right of renewal for additional 10-year periods. Yet another statute governed the leasing of agency or school lands. Act of April 17, 1926, 44 Stat. 300, 25 U.S.C. § 400a (1982). Finally, Section 16 of the Indian Reorganization Act granted organized tribes generally the power to block leasing of tribal lands, 25 U.S.C. § 476 (1982), and Section 17 allowed tribes which were *both* organized and incorporated to lease their lands (without secretarial approval) for not more than 10 years. 25 U.S.C. § 477 (1982).

The patchwork nature of existing law created a variety of problems, detailed by the Secretary of the Interior when he proposed the new law:

There is at present no law under which Executive order lands may be leased for mining, outside of [specified States], except for oil and gas . . . unless the tribes are hereafter qualified under . . . the Indian Reorganization Act . . .

The act of June 30, 1919 . . . frequently results in long delay and is often quite an expense . . . con-

sequently the opportunity to lease the land is lost

[U]nallotted Indian lands within [specified States are on] the same basis for prospecting and leasing for metalliferous metals as lands of the public domain The Secretary of the Interior has no discretion . . . in the matter of granting a lease to an applicant . . . and in several instances it has been necessary to grant the lease, notwithstanding the fact that the Indians of the reservation were opposed to leasing the lands

It is not believed that the present law is adequate to give the Indians the greatest return from their property

Letter from the Secretary of the Interior to the Speaker of the House of Representatives and the President of the Senate, June 17, 1937, reprinted in H. Rep. No. 1872, 75th Cong., 3d Sess. 1-2 (1938) and S. Rep. No. 985, 75th Cong., 3d Sess. 1-2 (1937).²²

²² There is very little recorded legislative history for the Act. It originated in a proposal from the Interior Department. On June 17, 1937, Charles West, Acting Secretary of the Interior, wrote identical letters to the Speaker of the House and the President of the Senate enclosing a proposed bill and urging its adoption. The proposed bill was forthwith introduced, without discussion, in the Senate, 81 Cong. Rec. 6016 (1937), and the House, 81 Cong. Rec. 8576 (1937). It was reported back with a recommendation of passage ("without amendment") by the House and Senate Committees. S. Rep. No. 985, 75th Cong., 1st Sess. (1937); 81 Cong. Rec. 7715 (1937); H.R. Rep. No. 1872, 75th Cong., 3rd Sess. (1938); 83 Cong. Rec. 2798 (1938). The committee reports reprint the Secretary's letter and say nothing more of substance. The bill passed both Houses without discussion. 81 Cong. Rec. 8399 (1937) (Senate); 82 Cong. Rec. 6057 (1938) (House).

There were predecessor Indian mineral leasing bills in the 73d Congress (S. 3565 and H.R. 9427) and in the 74th Congress (S. 2638 and H.R. 7681). Of these only S. 2638 was reported out of Committee; it passed the Senate and was not acted on by the House. The Committee report, S. Rep. No. 614, 74th Cong., 1st Sess., also reprinted a letter from the Secretary of the Interior, without elaboration.

The 1938 Act was designed to remedy these problems.²³ The major provisions are sections 1, 2, 4 and 5.²⁴ Section 1 authorizes tribal councils to lease unallotted lands for all kinds of mining purposes for periods of ten years "and so long thereafter as minerals are produced in paying quantities." 25 U.S.C. 396a (1982). Oil and gas leases are subject to mandatory competitive lease sales. 25 U.S.C. 396b (1982). As was its invariable habit when dealing with potentially indefinite alienation of tribal land interests, Congress required approval of the Secretary of the Interior for such leases.²⁵ 25 U.S.C. § 396a (1982). Section 2 requires the Secretary to lease lands by public auction, preserves his right to reject bids not in the best interests of the Indians, and saves the right, granted in § 17 of the Indian Reorganization Act, of organized and incorporated tribes to lease their lands for up to 10 years without either the public auction or the secretarial approval otherwise required under the Act.

²² It was not, however, designed to deal with all mineral leasing even of tribal lands; the Act specifically exempts "the Papago Indian Reservation in Arizona, the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, [and] the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma." § 6, as amended, 25 U.S.C. § 396f (1982). The exempted lands remained subject to special statutes. E.g., Act of June 4, 1920, c. 224, § 6, 41 Stat. 753, as amended by Act of May 26, 1926, c. 403, 44 Stat. 658 (Crow Tribe). The exemption does not apply to Section 5 of the Act, which authorizes the Secretary to delegate his authority to approve leases to subordinates. And mineral leasing of allotted lands within a Reservation remain generally subject to the Act of March 3, 1909, c. 263, 35 Stat. 873, as amended, 25 U.S.C. § 396 (1982).

²⁴ Section 3 requires performance bonds of lessees; Section 6, as already noted, exempts certain lands; and Section 7 repealed all inconsistent acts. 25 U.S.C. §§ 396c, 396f (1982); 52 Stat. 348.

²⁵ Compare § 17 of the IRA, 25 U.S.C. § 477 (1982), which allows incorporated tribes to lease tribal lands for minerals for periods of up to ten years without secretarial approval and without competitive lease sales for oil and gas. This power was reaffirmed in § 2 of the Indian Mineral Leasing Act, 25 U.S.C. § 396b.

25 U.S.C. § 396b (1982). Section 4 subjects the lessee's "operations" under mineral leases to rules and regulations of the Secretary, and authorizes him to approve unit and communitization agreements. 25 U.S.C. § 396d (1982). And § 5 authorizes the Secretary to delegate his authority to approve leases to subordinates. 25 U.S.C. § 396e (1982).

Nowhere does the Act restrict the taxing powers of Indian tribes, whether or not organized under the Indian Reorganization Act.²⁶ Section 4 does provide that "[a]ll operations under any oil, gas, or other mineral lease . . . shall be subject to the rules and regulations promulgated by the Secretary of the Interior." 25 U.S.C. § 396d (1982). Under this provision the Secretary has issued extensive regulations governing (for oil and gas leases, for example) prospecting, drilling, diligent development, prevention of waste, royalty measurement, valuation, and collection, and other aspects of mining operations. 25 C.F.R. Part 211 (1983). These regulations, which are silent on taxation, apply to all tribes, including those organized under the Indian Reorganization Act.²⁷

²⁶ Section 2 of the Act, 25 U.S.C. § 396b (1982), does explicitly provide "That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under [the IRA], to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted pursuant to [the IRA]." This provision was necessary because the IRA explicitly granted tribes that were both organized and incorporated under its provisions the right to lease lands for mineral development for periods of up to ten years without Secretarial approval. Absent the proviso, the Indian Mineral Leasing Act (which in all cases requires the approval of the Secretary for leases) could have been read to withdraw this right.

²⁷ Title 25 C.F.R. § 211.29 authorizes tribes organized under the IRA (and some others) to modify the operating regulations of Part 211 either by their constitutions or by ordinances. Organized tribes, as noted above, *see* footnote 26, are authorized to lease lands for mineral purposes in some circumstances without the approval of the Secretary of the Interior. Section 211.29 thus assures that all mineral leases on such a reservation will be subject to the same operating regulations and avoids the administrative complexities that

But that the Secretary was *authorized* to regulate *operations* on mineral leases hardly implies that he was also *directed* to supervise Indian tribal taxation of minerals. The Secretary's regulations deal with proprietary aspects of the lease transactions, for which the Secretary has a fiduciary responsibility, not the tribes' governmental authority.²⁸ Moreover, the distinction between regulation and taxation is a familiar one both to Congress and this Court. *E.g.*, *Rice v. Rehner*, — U.S. —, —, 77 L.Ed.2d 961, 970-972 and n.7 (1983) (distinguishing between tribal taxing authority, a "fundamental attribute of sovereignty," and tribal authority to regulate); *cf. Bryan v. Itasca County*, 426 U.S. 373 (1976).²⁹

This Court has repeatedly held that statutes will be construed to abridge Indian rights only in the case of a "clear and plain" expression by Congress of its intention to do so. *United States ex rel. Hualapi Indians v. Santa Fe Pac. Railroad*, 314 U.S. 339, 353 (1941); *accord, Bryan v. Itsaca County, supra; Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). There is no such expression here. Only four years before the Mineral Leasing Act, Congress had been scrupulous in gathering and deferring to the opinions of Indian tribal governments be-

would ensue if, on the same reservation, some leases were governed by tribal operating provisions and others by the rules imposed by Part 211.

²⁸ The Court in *Merrion* carefully distinguished between the Tribe's role as a property owner and its role as a sovereign, between actions that "sell the right to use the land and take from it valuable minerals" and "sovereign powers." 455 U.S. at 145-146. The Secretary's leasing regulations of course deal only with the former role, not the latter.

²⁹ Kerr-McGee also argues that the Navajo tax is invalid because it provides for forfeiture of the leasehold in case of nonpayment. Assuming *arguendo* that this aspect of the tax could be considered a regulation of mineral leasing, there is no reason for this Court to rule now on its validity. It may never be enforced; or, alternatively, should Kerr-McGee in the future refuse to pay the tax the Secretary might consider its failure to abide by the tribal ordinance a ground for exercising his own power of cancellation.

fore enacting legislation that would affect tribal powers. Yet Kerr-McGee argues that Congress in 1938 intended to deprive the seventy-seven tribes that had determined not to organize under the IRA²⁰ of a large part of their power to raise revenues—under the guise of a statute designed to help Indian tribes get “the greatest return from their property.” Congress may be subtle, but it is not malicious. When in the past it limited tribal taxing powers it did so explicitly. Had it intended to do so in 1938, it would have spoken clearly.

Nor is there substance to petitioner's assertions that the Secretary's trust supervision of Indian mineral leasing so occupies the field as to preempt tribal taxation of mineral operations. To be sure, this Court has on occasion held that *state* taxes on activities occurring on Indian lands have been preempted by federal law, as when the state taxes obstruct federal policies. *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965). But the inquiry is not simply whether federal law comprehensively regulates the activity in question. Rather, there must be “a particularized inquiry into the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). This inquiry takes place against the “backdrop” tradition of Indian sovereignty, *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973), a tradition ordinarily hostile to state taxation of Indian activities occurring on Indian reservations. *Id.*; compare *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (upholding some state taxation of tribal activities off the reservation).

²⁰ [1940] *Report of the Secretary of the Interior* 364. As mentioned above, many of these tribes were governing under constitutions established long before the IRA was enacted, and Congress had no desire to force them within the strictures of that Act. See pp. 15-19, *supra*.

Given the background tradition of Indian sovereignty, Congress's strong, continuing commitment to that tradition, and the canons of construction that ordinarily require Congress to be quite explicit before it will have been found to restrict tribal powers, *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *Washington v. Fishing Vessel Association*, 443 U.S. 658, 690 (1979), it is questionable whether general federal regulation of matters occurring on Indian reservations should ever be held to preempt existing *tribal* authority, particularly in matters so crucial to a tribe's basic existence as the power to tax. Certainly this Court has never held that it has. But in any event the calculus is evidently quite different when *tribal* authority, rather than *state* authority, is called into question.

Thus there is in this case no traditional canon of construction to counter the general principle that exemptions from taxation will not lightly be implied. Compare *Bryan v. Itasca County*, 426 U.S. 373, 392-393 (1976) (Congress must show a “clear purpose” to restrict Indian tax immunities); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 175-176 (1973) (construing ambiguous language in favor of Indian tax exemption). It cannot be said that the tribal taxes would obstruct a federal policy of “assuring that the profits derived from . . . sales will inure to the benefit of the Tribe,” or otherwise diminish tribal revenues. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980). Tribal taxation of mineral resources can hardly be thought to infringe on tribal rights to “make their own laws and be ruled by them,” *Williams v. Lee*, 358 U.S. 217, 220 (1959). And the Navajo tribe here—and other tribes imposing similar taxes—provide substantial (indeed, critical) regulatory functions and services that benefit all people on the reservation. Compare *Bracker*, 448 U.S. at 148-149, 151 (state's failure to identify services provided is a factor against the tax); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 156-157 (1980).

IV. NON-INDIANS DOING BUSINESS ON INDIAN RESERVATIONS DO NOT REQUIRE SPECIAL PROTECTIONS AGAINST TRIBAL TAXATION.

A constant descendant to the arguments of Kerr-McGee and its supporting *amici* is that non-Indians doing business on Indian reservations somehow require special protections against the possibility of taxation by Indian tribes—specifically, that tribes should not be allowed to impose such taxes without the permission of the Secretary of the Interior. But one searches the briefs in vain to see why.

Tribal governments are not bands of hooligans out for plunder. They are the democratically elected representatives of a proud and free people, with a record of humanity and tolerance unmatched on this continent. The historical record—and the records of this Court—shows countless examples of white mistreatment of Indians, not the opposite. Indian tribes know very well the economic importance of non-Indian businesses on their reservations. There is no reason to believe they will attempt to drive those businesses away.

There is no reason in general to fear that Indian tribes will impose unduly harsh or demanding taxes on business activities on their reservations. It is not without significance that Kerr-McGee has pointed to nothing about the present taxes that suggests they are overreaching or unfair. Indeed, tribal taxes are typically set at a level far lower than comparable state taxes—and vastly lower than, for example, the 30% coal severance tax sustained by this Court in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).³¹

³¹ For example, the Shoshone and Arapahoe tribal severance tax is set at a rate of 4%; the State of Wyoming taxes oil and gas operations at a rate of more than 12%. See Wyo. Stat. § 39-6-302; Wyo. Stat. § 39-2-402; Wyo. Stat. § 30-5-116(b)(ii). The exact tax depends on the amount of the mill levies by county and local governments pursuant to Wyo. Stat. § 39-2-402. The Assiniboine and Sioux Tribes' severance tax is set at 2%. The Montana severance

To be sure, neither Kerr-McGee nor its supporting *amici* are entitled to vote in tribal elections. But neither are they entitled to vote in state elections. People vote. Corporations, whether "foreign" or "domestic," do not. However much corporations might desire such a result, they are not entitled to an immunity from taxation wherever they are not enfranchised.

Petitioner is not without recourse if it believes that its tax burden is too high. Like all other taxpayers, it may take its case to the tribal council. Invalidity of any tax can presumably be raised in any affirmative suit by a tribe to enforce payment of the tax.³² Tribal courts, moreover, which have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property issues of both Indians and non-Indians, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978), are open to petitioner to entertain challenges against a tribal tax.

Most important, petitioner and others like it are free at any time to attempt once again to persuade Congress to limit tribal governmental authority, by, for example, imposing a general executive supervision over the legislative activities of Indian tribes, or constricting the rate at which Indian tribes may tax non-Indian businesses.

tax is 2.61% (2.1% of the first \$6,000 of oil produced each quarter). Montana Code Annotated § 15-36-101. In addition, Montana imposes an oil and gas conservation tax of 0.2%, Montana Code Annotated Sec. 82-11-131, and a Resource Indemnity Trust Tax of 0.5%, Montana Code Annotated, § 15-38-104. Finally, Montana imposes a tax on the net production. Montana Code Annotated § 15-23-601.

³² The holding in *Santa Clara Pueblo* that the Indian Civil Rights Act does not create a cause of action enforceable in an affirmative suit in the District Courts was bottomed on notions of tribal immunity from suit. But courts have regularly found a waiver of sovereign immunity, limited to the scope of the complaint, when tribes have themselves initiated lawsuits in federal court. *E.g., Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S. 463 (1979).

Congress could exercise its constitutional power to require that the executive approve all tribal tax ordinances, but Congress has never done so, although it has required executive approval for other tribal actions. If that step is to be taken, it rests with Congress to take it.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

REID PEYTON CHAMBERS *
LOFTUS E. BECKER, JR.
SONOSKY, CHAMBERS, SACHSE
& GUIDO
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 342-9131

*Counsel for the Shoshone Tribe
of the Wind River Indian
Reservation, Wyoming and the
Assiniboine and Sioux Tribes
of the Fort Peck Indian
Reservation, Montana*

THOMAS W. FREDERICKS
FREDERICKS & PELCYGER
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 443-1683

*Counsel for the Arapahoe Indian
Tribe of the Wind River Indian
Reservation, Wyoming*

PETER C. CHESTNUT
620 Roma, N.W., Suite D
Albuquerque, New Mexico 87102
(505) 842-6060

*Counsel for the Pueblo de Acoma
of New Mexico*

* Counsel of Record